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No. 665

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IN THE

SUPREME COURT OF THE UNITED STATES

ARLAN'S DEPARTMENT STORE OF LOUISVILLE, INC. . . . . Appellant

versus

COMMONWEALTH OF KENTUCKY . . . Appellee

ON APPEAL FROM
THE COURT OF APPEALS OF KENTUCKY

MOTION TO DISMISS AND BRIEF

On Behalf of Appellee

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January 7, 1964

ROBERTS PRINTING CO., FRANKFORT, KY.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1963

ARLAN'S DEPARTMENT STORE
OF LOUISVILLE, INC. - - - - - - *Appellant*

vs.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

ON APPEAL FROM
THE COURT OF APPEALS OF KENTUCKY

MOTION TO DISMISS AND BRIEF

Motion to Dismiss

Appellee, Commonwealth of Kentucky, moves the Court to dismiss the appeal upon the ground it does not present a substantial federal question, in that the question has been settled by prior decisions of this Court [Rule 16, 1(b)].

The Question: The constitutionality of Kentucky's Sunday Closing Law (KRS 436.160).

Brief in Support of Motion

Where the constitutional question sought to be appealed has previously been ruled upon by this Court, the appeal has been dismissed upon the ground that the constitutional question presented is not substantial in character.

Zucht v. King,
260 U.S. 174, 176; 67 L. Ed. 194, 198; 43 S. Ct. 24 (1922)

See Frankfurter & Landis, The Business of the Supreme Court at October Term, 1929; 44 H.L.R. 1, 12-14 (1930)

Frankfurter & Hart, The Business of the Supreme Court at October Term, 1932; 47 H.L.R. 245, 260 (1933)

Stern & Gressman, Supreme Court Practice, pp. 214, 215 (1950)

The question as to the constitutionality of the Sunday Closing Laws of three states was at one time decided by this Court in four recent cases.

McGowan v. Maryland,
366 U.S. 420, 6 L. Ed. 2d 393, 81 S.Ct. 1101 (Md.)

Gallagher v. Crown Kosher Super Market,
366 U.S. 617, 6 L. Ed. 2d 536, 81 S. Ct. 1122 (Mass.)

Two Guys From Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582, 6 L. Ed. 2d 551, 81 S.Ct. 1135 (Penn.)

Braunfeld v. Brown,
366 U.S. 599, 6 L. Ed. 2d 563, 81 S.Ct. 1144 (Penn.)

Like the laws of Maryland, Massachusetts and Pennsylvania, Kentucky's law provides a penalty for,

> "Any person who works on Sunday . . . or employs any other person. . . . " [KRS 436.160(1)]

The Kentucky statute excepts from its operation "ordinary household duties, *work of necessity or charity*" [KRS 436.160(1)] and "amateur sports, athletic games, operation of moving picture shows, chautauquas, filling stations or opera" [KRS 436.160(3)] (Emphasis added.)

The Kentucky law has been upheld by the Kentucky Court of Appeals in a long line of decisions, the last of which is the case at bar.

> The Commonwealth v. The Louisville and Nashville Railroad Co., 80 Ky. 291 (1882)
>
> Capital Theater Co. v. Commonwealth, 178 Ky. 780, 199 S.W. 1076 (1918)
>
> Strand Amusement Co. v. Commonwealth, 241 Ky. 48, 43 S.W. 2d 321 (1931)
>
> Commonwealth v. Phoenix Amusement Co., Inc., 241 Ky. 678, 44 S.W. 2d 830 (1931)
>
> City of Harlan v. Scott, et al., 290 Ky. 585, 162 S.W. 2d 8 (1942)
>
> Commonwealth v. Arlan's Dept. Store of Louisville, et al., Ky., 357 S.W. 2d 708 (1962)
>
> Arlan's Department Store of Louisville v. Commonwealth, Ky., 369 S.W. 2d 9 (1963)

There is nothing in the majority opinions of the McGowan, Gallagher, Two Guys or Braunfeld cases, supra, that indicates a Sunday statute which includes an exception for works of necessity is unconstitutional. Those opinions, on the contrary, face this issue and are all consistent with the constitutionality of the Kentucky

statute. We therefore cite them as dispositive of the question here involved.

See particularly McGowan v. Maryland, supra, wherein the Court indicates at p. 422 of 366 U. S. and p. 397 of 6 L. Ed 2d "The questions presented are * * * whether the laws are so vague as to fail to give reasonable notice of the forbidden conduct and therefore violate due process * * * ."

The Court in this Case was considering statutory language substantially identical to that involved in this appeal, since Sec. 492 of Md. Ann. Code, Art. 27, excepts all work of necessity and charity. See McGowan v. Maryland, supra, at p. 423 of 366 U.S., 397 of 6 L. Ed. 2d.

CONCLUSION

We submit therefore that this Court by its decisions in the McGowan, Gallagher, Two Guys and Braunfeld cases, supra, heretofore has decided the constitutionality of the equivalent of Kentucky's Sunday Closing Law and that appellant's appeal should be dismissed because it thereby does not present a substantial federal question.

Respectfully submitted,

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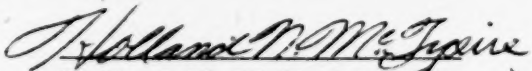
PROOF OF SERVICE

I, Holland N. McTyeire, one of the attorneys for Commonwealth of Kentucky, appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 7th day of January, 1964, I served copies of the foregoing Motion to Dismiss and Brief on the appellant herein by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorney of record as follows: To James E. Thornberry, Esq., 1011 Kentucky Home Life Building, Louisville 2, Kentucky, attorney for Arlan's Department Store of Louisville, Inc.



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